APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 3, 2000

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT OWEN BAILEY, Defendant-Appellant.

No. 99-5313

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

228 F.3d 637; 2000 U.S. App. LEXIS 24741; 2000 FED App. 0349P (6th Cir.)

September 12, 2000, Argued

October 3, 2000, Decided

October 3, 2000, Filed

Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 97-20255. Jerome Turner, District Judge

* * *

Before: NORRIS and DAUGHTREY, Circuit Judges; WISEMAN, District Judge*

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* The Honorable Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

Appendix A

WISEMAN, District Judge. In this appeal, Defendant Robert Owen Bailey appeals his conviction under *18 U.S.C. § 2422*(b) for using the internet to attempt to persuade, induce, entice, or coerce minors to engage in illegal sexual activity. For the reasons that follow, we **AFFIRM** the conviction.

I.

Defendant insists the charged offence requires the specific intent to commit illegal sexual acts rather than just the intent to persuade or solicit the minor victim to commit sexual acts. He complains that the trial court erroneously charged the jury the latter, rather than requiring a finding by the jury of an intent to commit the sexual act itself with the minor. He insists that, to hold otherwise, would criminalize mere sexual banter on the internet, or would criminalize content-based speech in violation of the First Amendment to the Constitution. Finally, he argues that the evidence at trial was insufficient to sustain a conviction for attempt. We address these issues seriatim.

II.

The Statute and The Necessary Intent

Interpretation of a statute begins with the statute's plain language, and if such language is clear and unambiguous, the Court will usually proceed no further. ***Barker v. Chesapeake & Ohio R.R.***, *959 F.2d 1361, 1366 (6th Cir. 1992)*. At the time of Bailey's conviction, the statute at issue here read:

> Whoever, using any facility or means of interstate or foreign commerce . . . knowingly persuades,

> induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined. . . .

18 U.S.C. § 2422(b) (emphasis added). While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves. Hence, a conviction under the statute only requires a finding that the defendant had an intent to persuade or to attempt to persuade. Defendant Bailey's attack is therefore meritless.

III.

Content-Based Speech and the First Amendment

Defendant relies on ***Reno v. American Civil Liberties Union***, *521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)*, to support his assertion that *18 U.S.C. § 2422*(b) infringes his right to constitutionally protected speech. In **Reno**, the Supreme Court found unconstitutional two provisions of the Communications Decency Act ("CDA"). The first provision prohibited the knowing transmission of "obscene or indecent" messages to anyone under the age of eighteen. ***Id.*** *at 859*. The second prohibited the use of a computer service to display "patently offensive" messages in a way that would make those messages available to those

under the age of eighteen. ***Id.*** The Court found the CDA was a content-based blanket restriction on speech because its purpose was to protect children from the primary effects of "indecent" and "patently offensive" speech. ***Id.*** *at 868.* Neither "indecent" nor "patently offensive" was defined in the act, making the scope of the act's coverage ambiguous and problematic. ***Id.*** *at 870.*Given such ambiguity, the Court doubted that the CDA had been carefully tailored to the congressional goal of protecting minors from potentially harmful materials and concluded that some messages entitled to constitutional protection would be self-censored by speakers who were unsure of the act's coverage and who feared criminal sanctions. ***Id.*** *at 871.*

No such overbreadth or ambiguity problems exist with *18 U.S.C. § 2422*(b). The statute only applies to those who "knowingly" persuade or entice, or attempt to persuade or entice, minors. Thus, it only affects those who intend to target minors: it does not punish those who inadvertently speak with minors or who, as in **Reno**, post messages for all internet users, either adults orchildren, to seek out and read at their discretion. Any limited or incidental effect on speech does not infringe on any constitutionally protected rights of adults. Put another way, the Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts. Defendant's constitutional challenge is without merit.

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IV.

Sufficiency of the Evidence

At trial, each minor testified that she had never met any of the other female witnesses prior to the trial. Each also testified that Bailey, under the alias Stealth725, contacted her, urged her to meet him, and used graphic language to describe how he wanted to perform oral sex on her. All three testified they told Bailey they were minors. One, A.M., e-mailed Bailey a picture of herself, which the police later retrieved from Bailey's computer. The same minor testified that Bailey e-mailed her his pager number and his private pin number for the pager and that he urged her to call him and arrange a meeting. M.M., whose report prompted the investigation of Bailey, testified that she became frightened when Bailey sent her a message identifying her hair color, what she had worn to school that day, and the time during which she ate lunch at school. The FBI then seized Bailey's computer and retrieved several explicit messages that were identical to or similar to those the minors had described. The internet user names of the minors were also retrieved from Bailey's hard drive. Several e-mails wherein Stealth725 proposed meeting the girls to perform oral sex were read into the record. Bailey himself testified that he had tried to set up meetings with people six or eight different times, though he claimed no meeting had ever taken place, that it was all just a game, and that the minors were either mistaken or lying about telling him their ages.

The prosecution must have presented evidence of objective, overt acts that would allow a reasonable jury to

find Bailey had taken a substantial step toward persuading, inducing, enticing, or coercing a minor to engage in illegal sexual activity. "A substantial step must be something more than mere preparation. . . . [I]t must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute." ***United States v. Manley***, *632 F.2d 978, 987-8 (2d Cir 1980).*

The evidence in this case was sufficient for a reasonable jury to find guilt of attempt to persuade beyond a reasonable doubt, as they did. The judgment and conviction are **AFFIRMED**.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE DATED FEBRUARY 19, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

Case Number: 2:97CR20255-001-TU

UNITED STATES OF AMERICA

v.

ROBERT OWEN BAILEY

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The Defendant, *ROBERT OWEN BAILEY*, was represented by retained counsel, Mr. Stuart B. Breakstone.

The Defendant was found guilty on Counts *1, 2 and 3* of the Indictment.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2422(b)	Coercion and Enticement of a Minor	09/10/1997	1 - 3

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The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

02/12/1999
Date of Imposition of Judgment

s/ Jerome Turner
JEROME TURNER
U.S. District Judge

Date Signed: February 18, 1999.

Defendant's Soc. Sec. No.: 408-90-1177
Defendant's Date of Birth: 07/25/1950
Defendant's USM No.: 16211-076

Defendant's Mailing Address:
1402 Hickory Way
Memphis, TN 38119

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of fifty-one (51) month(s).

The defendant shall surrender for service of his sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

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If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page). The defendant shall also comply with the following additional conditions:

Defendant's employment and living address must be approved by the United States Probation Office;

Defendant shall not possess any pornographic material;

Defendant shall register with local law enforcement officials as may be required;

Defendant shall have no contact, directly or indirectly, with the victims in this case;

Defendant shall not possess any computer equipment with a modem or internet service for the transmission of computer data;

Defendant shall not use any sexually oriented telephone services.

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STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

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9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

Count	*Assessment*	*Fine*	*Restitution*	*CS/CC Counts*
1	$100.00			
2	$100.00			
3	$100.00			
Totals:	$300.00			

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total Special Assessment shall be due in full immediately

All financial penalty payments are to be made to the Clerk, U.S. District Court for the Western District of Tennessee, 242 Federal Building, 167 N. Main Street, Memphis, Tennessee 38103, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

APPENDIX C — ORDER ON JURY VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION FILED NOVEMBER 18, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Cr. No. 97-20255-TU

UNITED STATES OF AMERICA

Plaintiff,

v.

ROBERT OWEN BAILEY,

Defendant.

ORDER ON JURY VERDICT

This cause came on for trial on November 2, 1998, the United States Attorney for this district representing the government, and defendant, Robert Owen Bailey, appearing in person and with retained counsel, Mr. Stuart B. Breakstone.

Jurors were selected and sworn and opening statements were presented by counsel. After hearing all proof presented, closing arguments of counsel and jury charge, the jury began deliberations on November 6, 1998. After due deliberation, the jury returned into open court on November 6, 1998 and

announced a verdict of GUILTY on Counts 1, 2 and 3 of the Indictment.

Sentencing is set for **Friday, February 12, 1999 at 3:30 p.m.** Defendant may remain on his present bond pending sentencing. Defendant is ordered not to use America Online, or any other computer service to communicate with other persons.

ENTERED this 18th day of November, 1998.

s/ Jerome Turner
JEROME TURNER
UNITED STATES DISTRICT JUDGE